**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **STEVEN OGBORNE, OGBORNE WASTE REMOVAL, INC. and OGBORNE TRASH REMOVAL, INC.** | : | |
| | : | **CIVIL ACTION** |
| **v.** | : | |
| | : | **NO. 97-4374** |
| **COUNCILMAN WILLIAM R. BROWN III BARBARA BOHANNAN-SHEPARD, THADDEUS KIRKLAND, CITY OF CHESTER POLICE DEPT., CITY OF CHESTER, JAMES CLARK and WENDELL BUTLER** | : | |

**M E M O R A N D U M**

**WALDMAN, J.** **June 13, 2000**

## I. Introduction

This case arises from the arrest and prosecution of Steven Ogborne for reckless endangerment in the manner he allegedly operated a truck when confronting protestors at a trash conversion facility in Chester, Delaware County.

Plaintiff Steven Ogborne is pursuing claims under 42 U.S.C. § 1983 against all defendants for false arrest, malicious prosecution, false imprisonment and "violation" of his "property interests." The plaintiff corporations are pursuing § 1983 claims against the defendants for "violation" of their "property interests" allegedly occasioned by Mr. Ogborne's arrest and

prosecution.[1] The liability of the defendant City is premised on its alleged failure properly to train or supervise its officers and an allegation that the violations complained of resulted from a municipal "policy."[2]

Presently before the court are the motion for summary judgment of defendants Brown, Butler, Bohannan-Shepard and City of Chester and the motion for summary judgment of former Chief of Police Clark.[3]

## II. Legal Standard

In considering a motion for summary judgment, a court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment

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[1]Plaintiffs have neither pled nor elaborated upon each claim with the greatest cogency. They have often referred to "defendants" without clearly articulating which claims apply to which defendants based on their conduct. The court has nevertheless parsed plaintiffs' allegations and construed them as liberally as one fairly can in the overall context of the pleadings and evidence of record.

[2]Although not pled in their complaint, plaintiffs in a brief also refer to an equal protection violation.

[3]The court granted defendant Kirkland's motion for summary judgment on October 13, 1999 and will now enter judgment in his favor. The Chester Police Department is not an entity subject to suit under § 1983 and it will thus be dismissed as a party defendant. See Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 n.4 (3d Cir. 1997); Irvin v. Borough of Darby, 937 F. Supp. 446, 450 (E.D. Pa. 1996); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 825-26 (D.N.J. 1993).

as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999).

## III. Facts

From the competent evidence of record as uncontroverted or otherwise taken in a light most favorable to plaintiffs, the pertinent facts are as follow.

The respective plaintiff corporations are, and at all pertinent times were, in the business of hauling and dumping waste and trash. Ogborne Trash Removal is owned and operated by

plaintiff Steven Ogborne, his mother and his brother. Ogborne Waste Removal is owned by Carl Ogborne, Steven's father, who operates the business with the assistance of his son and wife.

Ogborne Waste Removal received a permit from the Delaware County Solid Waste Authority ("the Authority") to enter and dump at any of three authorized sites in the County, including the Westinghouse Trash-to-Steam Facility ("the Westinghouse facility") operated by Westinghouse Resource Energy, Inc. in Chester.[4] It is not altogether clear whether such a permit was also given to Ogborne Trash Removal or whether it piggybacked on the Ogborne Waste Removal permit. In any event, it may fairly be inferred from the record that the Authority

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[4] The Authority purchases and operates landfills pursuant to the Pennsylvania Solid Waste Management Act and the Pennsylvania Waste Planning, Recycling and Management Act. See 35 Pa. Stat. §§ 6018.101 et seq.; 53 Pa. Stat. §§ 4000.101 et seq. The latter Act provides that each county is responsible for the collection, transportation, processing and disposal of municipal waste which is generated or present within its boundaries. See id. § 4000.303. To this end, each municipality must implement an approved plan for the handling and disposal of waste and may adopt ordinances, regulations and standards for doing so. See id. To satisfy these obligations, Delaware County created the Authority pursuant to the Municipality Authorities Act of 1945 to administer the solid waste plans. See 53 Pa. Stat. § 306 et seq. The Authority is empowered to acquire and operate solid waste disposal facilities for the County, and has done so at two sites within the County. The County also arranged for dumping at the privately owned and operated Westinghouse site. The Authority issues permits to dump waste and trash at the Westinghouse facility and the two other sites in the County.

permitted Ogborne Trash Removal, as well as Ogborne Waste Removal, to enter and dump at the three designated sites.

On July 29, 1995, a group of about thirty people gathered at the Westinghouse facility to protest the operation of and disposal of trash at the site. Zulene Mayfield, head of Chester Residents Concerned for Quality Living ("CRCQL"), a Pennsylvania non-profit public service corporation, had organized the demonstration. She sent out fliers advertising the demonstration and announced at a City Council meeting that it would take place.

Among those in attendance were defendant Chester City Councilman William R. Brown III, defendant Chester Mayor Barbara Bohannan-Shepard, defendant Pennsylvania State Representative Thaddeus Kirkland, Cindy deProphetis, a reporter preparing a story on the protest for the Delaware County Daily Times, Reverend Norman Gant and Ms. Mayfield herself. The protesters carried signs proclaiming their concerns and formed a picket line to prevent any trucks from unloading waste or trash at the facility. A portion of the protest was recorded on video by Drexel University Television ("DUTV") and Channel 29 Fox News.

Also at the facility were several Chester police officers who were parked on the opposite side of the street from

the protesters.[5] They did not participate in or attempt to break up the demonstration. General Chester Police Department policy is to intervene in such situations only when necessary to maintain law and order.[6]

Some of the officers at the scene of the incident recognized Councilman Brown and Mayor Bohannan-Shepard. It is uncontroverted, however, that the Chester police officers did not consider Mr. Brown to be in the chain of authority over them and would not have followed any orders given by him. There is no evidence in the record that Ms. Bohannan-Shepard exercised influence over the officers at the protest. Inspector Butler acknowledged that the Mayor is in a position of authority over the Police Department, but testified that he would not follow any order given by her which was inconsistent with his understanding of the law.

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[5]Upon learning of a public demonstration, ordinarily the chief of police or duty supervisor orders a patrol sergeant to assign officers to duty for the event. Such assignments range from a periodic patrol car drive-by to the stationing of officers at the scene. The ranking patrol officer reassesses the need for police presence throughout the event. On the morning of the protest, Inspector Butler ordered Sergeant Lewandowski to assign patrol officers to monitor the event. Sergeant Lewandowski did so and also assigned himself to the protest and ordered patrol cars in the area to drive by periodically.

[6]Where Chester police determine that persons are interfering with ingress or egress at a site or roadway, they will testify at a court proceeding for an aggrieved party to obtain an appropriate restraining order.

At about 10:00 a.m., a truck owned by plaintiff Ogborne Trash Removal and driven by its employee Keith Festus arrived to make a delivery at the facility. The truck stopped before the picket line. Mr. Kirkland and Mr. Brown approached the driver and requested that he "honor the picket line." Mr. Brown told Mr. Festus that the police "weren't going to do anything" because he was a City Councilman and director of finance who paid them and because the Mayor was also present. There is no evidence that Ms. Bohannan-Shepard participated in the confrontation of Mr. Festus or in any way condoned, or even overheard, Mr. Brown's reference to her in inducing Mr. Festus to leave.

Mr. Brown and protesters John Shelton, Jr. and Doreen Coleman overheard someone over the truck's CB tell Mr. Festus to drive through the crowd. Mr. Festus states that the dispatcher told him that he saw no reason why Mr. Festus would not be permitted to enter, but he was ultimately instructed by the dispatcher to drive around the corner, park the truck and wait. Mr. Festus does not recall the dispatcher telling him to drive through the protesters.

Mr. Festus left the facility without unloading. Plaintiff Ogborne met Mr. Festus a short distance away from the facility and exchanged places with him. Mr. Ogborne had successfully unloaded a couple of trucks at the facility earlier in the morning and believed the protesters would let him pass.

When he entered the drive to the facility, the protesters moved to block the road. He slowed down to avoid hitting the protesters.[7]

After plaintiff Ogborne's truck crossed the picket line, he sped up and the protesters chased him. One of the protesters, Doreen Coleman, exclaimed that she had been hit. Mr. Kirkland then threw rocks at the truck and threatened to "Reginald Denny" Mr. Ogborne. At the time, Mr. Ogborne "did not understand" the meaning of Mr. Kirkland's remark. Some of the protesters yelled at the police to charge Mr. Ogborne with attempted murder.

Shortly thereafter, defendant Inspector Butler arrived and took charge at the scene in response to a call by Sergeant Lewandowski who was concerned that the crowd was becoming unruly. The Inspector was told by Officer Blythe that he saw Mr. Ogborne drive "through" the protestors, forcing them to jump out of the way. Officer Blythe told Inspector Butler that Mr. Ogborne should be arrested. Inspector Butler, however, instructed that no arrest be made until he had conducted further inquiry as to what occurred.

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[7]Mr. Ogborne stated that he was driving at 1 or 2 miles an hour as he entered the facility. No reasonable factfinder viewing the DUTV video, the only film submitted by the parties, could conclude that Mr. Ogborne was proceeding as slowly as he claims. Plaintiffs' own expert estimated the speed of the truck at "about 10 miles per hour." This film shows Mr. Ogborne's truck entering the facility at an angle from the driver's side. Ms. Coleman testified that she was struck by the passenger side of the truck.

Reverend LeRoy Carter, an employee of the Westinghouse facility, told Mr. Ogborne that he could not unload his truck at the site during the demonstration. The drivers of trucks owned by several other hauling companies left without attempting to enter the facility during the protest. Reverend Carter later apologized to the demonstrators on behalf of Westinghouse for what he characterized as "the arbitrary ramming through the protest line by the truck driver" and stated that Westinghouse would take "stringent action" against Mr. Ogborne's company.

Several of the protesters, including Mr. Brown, had positioned themselves in the drive in front of Mr. Ogborne's truck to prevent him from leaving. Inspector Butler asked them to allow Mr. Ogborne to leave, but they refused. An impasse of about three hours ensued. During much of this time. Mr. Ogborne was standing or walking outside of the truck. Mr. Ogborne then asked one of the officers present if he could back the truck away from the protesters and exit from the rear. The officer responded affirmatively and Mr. Ogborne then backed the truck up about sixty yards and left on an access road which trucks were normally not permitted to use. There is no evidence that the demonstrators attempted to prevent Mr. Ogborne from doing so.

Mr. Ogborne was given a traffic citation which was never enforced. Ms. Mayfield and Mr. Brown were given citations for blocking egress at the entrance of the facility. There is no evidence of record as to the disposition of those citations.

Mr. Kirkland told Inspector Butler at the scene that Mr. Ogborne could have killed someone and should be “locked up” for “attempted murder.” He also said that he “had to get out of the way of the truck.” He showed the Inspector some skid marks which he had not seen before the incident and assumed had been made by Mr. Ogborne’s truck. They were not in fact made by his truck. Mr. Kirkland also suggested that Mr. Ogborne had broken the law by leaving on a road not to be used by trucks.

Inspector Butler told Representative Kirkland that he and the others present would have to give statements at the police station. Mr. Brown, Mr. Kirkland, Ms. Mayfield and others went to the police station to give statements. Some of the protesters may have met first with Chief Clark, although usually witnesses would meet only with the designated investigating officer. There is no evidence of record to show which protesters may have met with defendant Clark.

Councilman Brown gave a statement to Inspector Butler on August 1, 1995 in which he explained that Mr. Ogborne drove through the crowd and that he and other protestors, as well as Ms. deProphetis, had to run to evade the truck. He also stated that Mr. Ogborne struck Ms. Coleman with his truck. Representative Kirkland gave a statement to Inspector Shoates stating that Mr. Ogborne had failed to stop or slow down when he entered the drive and that his truck had struck Ms. Coleman. The

statement contains no reference to Mr. Kirkland himself having to get out of the way of the truck.

Ms. Mayfield, Reverend Gant, Ms. deProphetis, Westinghouse employee Stanley Betters, Willie Hatcher and John Shelton, Jr. provided signed statements to the police during interviews conducted between July 31 and August 3, 1995. Signed statements were also obtained from Drexel University student Robert Bahar and Temple University professor George Dolph on August 5, 1995.

Several of these witnesses stated that Mr. Ogborne was driving at a high rate of speed (Ms. deProphetis, Reverend Gant, Mr. Hatcher), that he failed to slow down and seemed to accelerate as he approached the line of protesters (Ms. deProphetis, Reverend Gant, Mr. Hatcher, Mr. Dolph, Mr. Shelton) and that a number of protesters had to scatter or jump out of the way to avoid being hit by the truck (Ms. deProphetis, Reverend Gant, Mr. Bahar, Mr. Hatcher, Mr. Dolph, Mr. Shelton).

Ms. Mayfield gave a statement to Inspector Shoates that Mr. Ogborne drove his truck through the crowd and struck a female protestor. Mr. Dolph told Inspector Butler that he feared he would be hit by the truck, that the driver appeared to be driving toward the crowd intentionally and that he had told several police officers at the scene the driver should be arrested for assault with a motor vehicle.

Mr. Hatcher told Inspector Shoates that Ms. Coleman told him at the scene that the truck hit her. Reverend Gant told Sergeant Paul Willard that the truck had struck Ms. Coleman. Ms. Coleman provided a signed statement to Inspector Butler in which she confirmed that she was struck by Mr. Ogborne's truck. Mr. Shelton and Ms. Coleman also told interviewing officers that they overheard the dispatcher on the CB tell the original driver to drive through the protesters.

David Ogborne, plaintiff Ogborne's uncle who was present at the scene, gave a statement to a detective on August 1, 1995.[8] Plaintiff's uncle related that his nephew was proceeding at a speed of 5 to 8 miles per hour as he entered the facility and that there was no one in front of the truck at that time.

Several law enforcement officers also provided witness statements on August 3, 1995. Sergeant Ronald Lewandowski stated that Mr. Ogborne was driving toward the crowd at an imprudent speed estimated by the Sergeant as about 25 miles per hour. Officer Michael Ruggieri stated that he saw people scatter to avoid being hit and that immediately after the truck passed, he saw Ms. Coleman being assisted by others and heard people calling

[8]Plaintiff Ogborne testified, apparently based on hearsay, that the police failed to interview his uncle. David Ogborne, however, testified that he was in fact interviewed within three days of the incident.

for an ambulance. Officer Nelson Collins stated that he saw Mr. Ogborne drive the truck "through" the protesters and that he called the paramedics when Officer Blythe advised him Ms. Coleman had been hit by the truck.

Officer Blythe stated that Ms. Coleman told him the truck hit her and that based on this and the speed at which Mr. Ogborne drove through the crowd, the officer believed that Mr. Ogborne should have been arrested. Officer Blythe was so concerned about his own personal safety that he felt compelled to place his hand on his weapon when ordering Mr. Ogborne to stop his truck.

Inspector Butler saw Ms. Coleman being placed in an ambulance and was told by Officer Blythe that something should be done about Mr. Ogborne's conduct because he had driven "through" the protesters, causing them to jump out of the way.

Reverend Gant had called Ms. deProphetis to advise her that protesters were going to give statements and there would be a press conference afterwards. In a Delaware County Daily Times article, Representative Kirkland was later correctly quoted as saying that Mr. Ogborne should be charged with attempted murder. Mr. Brown, Ms. Bohannan-Shepard and Mr. Kirkland aver, with no competent evidence to the contrary, that except for providing witness statements, they never communicated with any of the officers involved in the investigation and never pressured any official to secure criminal charges against Mr. Ogborne or to retaliate in any manner against plaintiffs.

The decision to file charges is usually made by an investigating officer. Detective Polites was designated on August 1, 1995 as the investigating officer. He was not one of the officers at the scene. He felt "pressured" by his partner, Inspector Shoates, and Inspector Butler to file some charge against Mr. Ogborne. He was concerned about what charge to file and wanted to forward the case for assessment to the District Attorney. After consultation with Inspector Butler, Chief Clark decided that Mr. Ogborne should be charged with reckless endangerment. Inspector Butler and Detective Polites executed and filed a criminal complaint with a supporting affidavit on August 3, 1995 at which time a summons was issued by a district justice.[9]

With his attorney, Mr. Ogborne met Inspector Butler for processing at the police station on August 13, 1999. Mr. Ogborne was placed in a holding cell for 30 to 60 minutes. He was then photographed, fingerprinted and released on his own recognizance.

A preliminary hearing was scheduled. Mr. Ogborne failed to appear. He thought the hearing had been postponed. The presiding judge issued a bench warrant for Mr. Ogborne for his failure to appear. Mr. Ogborne learned of the warrant and appeared at the courthouse about an hour later. At that time he

[9]Chief Clark, Inspector Butler and Inspector Shoates also viewed film footage of the incident prior to the charging decision.

was detained in a holding cell for 45 minutes until his father arrived with $2,500 to post bail.

A preliminary hearing was held on January 4, 1996. Mr. Brown, Mr. Kirkland, Mr. Dolph, Reverend Gant, Ms. Mayfield, Mr. Hatcher, Ms. DeProphetis and Ms. Coleman testified.

Mr. Brown testified that there were several protesters in front of the truck as it drove through the entrance to the Westinghouse facility. He testified that he was not directly in front of the truck when Mr. Ogborne drove through the entrance. As throughout the history of the investigation and prosecution, he did not indicate that he felt he himself was in danger of bodily harm.

Mr. Kirkland testified that several protesters were in "harm's way" and had to "jump out of the way" when Mr. Ogborne drove the truck through the picket line. Mr. Kirkland testified that he himself did not need to move out of the way when the truck drove through part of the line of protesters.

Ms. Coleman testified that she was struck by Mr. Ogborne's truck and was taken to a hospital.

The other witnesses testified essentially to what they related in their respective witness statements to the police during the investigation.

After hearing the direct testimony and cross-examination, and viewing film of the incident, the presiding

judge found probable cause to hold Mr. Ogborne for trial for reckless endangerment. The district attorney proceeded to trial on five counts of reckless endangerment in the Delaware County Common Pleas Court. He voluntarily withdrew the two counts naming Mr. Brown and Ms. deProphetis as victims prior to the conclusion of trial.[10] Mr. Ogborne was acquitted on August 28, 1996.

Reverend Carter, who witnessed the incident and told Mr. Ogborne he could not unload at the Westinghouse facility that day, submitted a report of the incident to his supervisors. Westinghouse promptly requested that the Authority direct plaintiffs not to use the Westinghouse facility. By July 31, 1995, the Authority had advised the plaintiffs to cease dumping at the Westinghouse facility. The Authority continued to permit plaintiffs to dump at the other two locations, one of which was within a mile of the Westinghouse site. Only the Westinghouse site, however, maintained Saturday hours. Plaintiffs were permitted to return to the Westinghouse facility on or shortly after September 9, 1996.

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[10]Ms. deProphetis later stated that Detective Polites told her Chief Clark wanted her named as a victim as retribution against her. There is no suggestion of why Chief Clark would seek retribution against Ms. DeProphetis or how identifying her as a victim of reckless endangerment would constitute punishment. In any event, the statement is hearsay. There is no testimony from Detective Polites or Chief Clark that such a statement was actually made and no other competent evidence to that effect. Ms. deProphetis never disavowed her statement shortly after the incident that she had to jump out of the way of the truck as it entered the facility.

Lee Fulton, a Westinghouse management team employee, testified at his deposition that the decision to request the Authority to instruct plaintiffs not to dump at the Westinghouse facility was made by the Westinghouse plant manager on July 31, 1995. He testified that the decision was based on Westinghouse's concern for the safety of its customers, employees and the people continuing to protest in front of the facility, its express contractual obligation to the Authority to operate the facility safely, and the prospect of losing good will and other business. Mr. Fulton's testimony is uncontroverted by any competent evidence of record.

## IV. Discussion

A. Individual Defendants

1. § 1983 Malicious Prosecution, False Arrest and False Imprisonment Claims

Plaintiff Ogborne predicates his § 1983 malicious prosecution claim on the Fourth and Fourteenth Amendments.

Plaintiff's claim under the Fourteenth Amendment that he was "deprived of his liberty" as a result of a "prosecution without probable or reasonable cause" sounds in substantive due process. See Merkle v. Upper Dublin School District, 2000 WL 558985, *7 (3d Cir. May 9, 2000); Telepo v. Palmer Twp., 40 F. Supp. 2d 596, 609-10 (E.D. Pa. 1999).[11] A § 1983 malicious prosecution claim, however, may not be predicated on the

[11]Plaintiff has presented no evidence that he was denied any procedural right guaranteed by the Constitution, or for that matter by state law.

Fourteenth Amendment substantive due process clause. See Albright v. Oliver, 510 U.S. 266, 274-75 (1994).

To sustain a § 1983 malicious prosecution claim under the Fourth Amendment, there must be a seizure or deprivation of liberty effected pursuant to legal process. See Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (3d Cir. 1995). Plaintiff Ogborne's detention, however brief, and his obligation to go to court and answer the charges against him constitute a sufficient restraint of liberty or "seizure" to satisfy this requirement. See Gallo v. City of Phila., 161 F.3d 217, 224-25 (3d Cir. 1998). A seizure does not violate the Fourth Amendment, however, unless it is unreasonable. See Brower v. County of Inyo, 489 U.S. 593, 599 (1989) ("'Seizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable'"). The restraint on Mr. Ogborne's liberty was of a type which ordinarily accompanies criminal prosecution and is not unreasonable if the prosecution was initiated with probable cause.[12]

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[12]At the time of Albright, the Third Circuit had the "most expansive approach" to malicious prsecution claims under § 1983, requiring only proof of the elements of the common law tort. Albright, 510 U.S. at 270 n.4. Other circuits required a showing of egregious misconduct resulting in a constitutional deprivation. Id. The Third Circuit has now noted that Albright at least "casts doubt" on prior precedent adopting the elements of the common law tort for § 1983 claims and has suggested that rather one must look to the text of the constitutional provision on which the claimed right is predicated. See Merkle, 2000 WL 558985 at *7. Under Third Circuit precedent, the presence of probable cause is fatal to a § 1983 malicious prosecution claim. See Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996); Lee v. Mihalich, 847 F.2d 66, 70 (3d Cir. 1988). Under a Fourth Amendment analysis, a brief detention for booking or bail procedures and the need to appear for arraignment and trial do not constitute an "unreasonable" restraint or "seizure" when they are incident to a criminal proceeding initiated with probable cause.

An arrestee may assert § 1983 false arrest and false imprisonment claims based on an arrest made without probable cause and any subsequent detention resulting from that arrest. See Groman v. Township of Manalapan, 47 F.3d 628, 636 (3d cir. 1995). "A false imprisonment claim under § 1983 which is based on an arrest made without probable cause is grounded in the Fourth Amendment's guarantee against unreasonable seizures." Id. Unlike false imprisonment, damages for false arrest cover only the time of detention to the issuance of process or arraignment. See Heck v. Humphrey, 512 U.S. 477, 484 (1994). Where probable cause existed to charge a plaintiff, he cannot sustain a § 1983 claim for false arrest or imprisonment resulting from the charge. See Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). See also Groman, 47 F.3d at 636.[13]

Probable cause exists where the totality of facts and circumstances are sufficient to warrant an ordinary prudent officer to believe that the party charged has committed an offense. See Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997); Pansy v. Preate, 870 F. Supp. 612, 618 (M.D. Pa. 1994),

[13]When a prosecutor elects to proceed, a police officer may be liable for malicious prosecution only if he knowingly or with reckless disregard for the truth concealed exculpatory evidence from or provided false or misleading reports to the prosecutor or otherwise interfered with the prosecutor's ability to exercise independent judgment. See Sanders v. English, 950 F.2d 1152, 1162-64 (5th Cir. 1992); Barlow v. Ground, 943 F.2d 1132, 1136-37 (9th Cir. 1991), cert. denied, 505 U.S. 1206 (1992); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990); Kim v. Gant, 1997 WL 535138, *4-5 (E.D. Pa. Aug. 15, 1997). Reckless disregard means that the officer "entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." United States v. Clapp, 46 F.3d 795, 801 n.6 (8th Cir. 1995).

aff'd, 61 F.3d 896 (3d Cir. 1995). Where one cannot reasonably conclude from the evidence taken in a light most favorable to the plaintiff that probable cause was lacking, the court may decide the issue as a matter of law. See Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997).

In determining whether probable cause exists, police officers may rely on seemingly reasonable information from a citizen identifying himself as the victim of a crime. See Owens ex rel Young v. County of Delaware, 1996 WL 476616, at *14 (E.D. Pa. Aug. 15, 1996). See also Tangwell v. Studkey, 135 F.3d 510, 516 (7th Cir. 1998); Sharrar, 128 F.2d at 818-19; Clay v. Conlee, 815 F.2d 1164, 1168 (8th Cir. 1987); Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988); Pravda v. City of Albany, 956 F. Supp. 174, 184-85 (N.D.N.Y. 1997) (officer had probable cause as matter of law to arrest plaintiff for reckless endangerment based on report of seemingly credible purported victim that plaintiff struck him with car at scene of heated argument).

Whether an arrest has been effected with probable cause is determined by an objective test based on "the facts available to the officers at the moment of arrest." Beck v. Ohio, 379 U.S. 89, 96 (1964); Barna v. City of Perth Amboy, 42 F.3d 809, 819 (3d Cir. 1994). Probable cause does not require the police to have evidence sufficient to establish guilt beyond a reasonable doubt. Id.; United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984). "The validity of the arrest does not depend on whether the suspect actually committed the crime" and his "later

acquitt[al] of the offense for which he is arrested is irrelevant to the validity of the arrest." Michigan v. DeFillippo, 443 U.S. 31, 36 (1979). See also Groman, 47 F.3d at 634.

An officer who has probable cause to arrest is not required to conduct further investigation for exculpatory evidence or to pursue the possibility that the suspected offender is innocent. See Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.), cert. denied, 519 U.S. 867 (1996); Simkunas v. Tardi, 930 F.2d 1287, 1292 (7th Cir. 1991); Marx v. Gumbinner, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990); Kompare v. Stein, 801 F.2d 883, 890 (7th Cir. 1986).[14]

The statements by police officers and other witnesses present during the incident would clearly warrant a reasonable person to believe that Mr. Ogborne "recklessly engage[d] in conduct which place[d] or may [have] place[d] another person in

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[14]Plaintiffs contend that "the defendants failed in their duty to properly investigate the incident." It is unclear whether plaintiffs meant to assert some distinct claim for failure to conduct an adequate investigation or are simply arguing that a better investigation would have exonerated Mr. Ogborne and thus those responsible for an inadequate investigation are liable for the ensuing arrest and prosecution. In any event, a suspect has no constitutional right to a professionally executed investigation. Rather, the issue is the presence or absence of probable cause to charge him. See Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995); Criss v. City of Kent, 867 F.2d 259, 263 (6th Cir. 1988); Ahlers v. Schebil, 994 F. Supp. 856, 876-77 (E.D. Mich. 1998). Moreover, it clearly appears from the record presented that a diligent investigation of the incident in question was undertaken. Although there was probable cause to arrest Mr. Ogborne at the scene based on Officer Blythe's firsthand report, Inspector Butler directed that no arrest be made until further investigation was conducted.

danger of death or serious bodily injury." See 18 Pa. C.S.A. § 2705.

Police and civilian witnesses alike stated that Mr. Ogborne was driving at an imprudent rate of speed, failed to slow down and even seemed to accelerate as he drove his truck "through" the protesters. There were also a number of statements that people had to scatter to avoid being hit by the truck. Police and civilian witnesses saw Ms. Coleman being transported from the scene in an ambulance. Ms. Coleman told Inspector Butler, and later testified at the preliminary hearing and trial, that she was struck by plaintiff Ogborne's truck.[15]

From the competent evidence of record, one could not reasonably conclude that probable cause was lacking to charge and prosecute Mr. Ogborne for reckless endangerment when the decisions to do so were made.[16]

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[15]There is no evidence that when the charging decision was made, Inspector Butler or Chief Clark had "serious doubts" about or "obvious reasons" to doubt the truth of the information provided to them or that they failed fully and forthrightly to relate that information to the prosecutor.

[16]It follows that at a minimum a reasonable officer could have believed that there was probable cause to charge plaintiff Ogborne with reckless endangerment in light of clearly established law and the information known to defendants Clark and Butler. See Hunter v. Bryant, 502 U.S. 224, 229 (1991) (qualified immunity "protect[s] all but the plainly incompetent or those who knowingly violate the law"); Malley v. Briggs, 475 U.S. 335, 341 (1986) (police official liable for civil damages for arrest only if "no reasonable competent officer" would conclude probable cause existed); Lee v. Mihalich, 847 F.2d 66, 69 (3d Cir. 1988) (official liable for civil damages for malicious prosecution only if his action was so apparently unlawful that no reasonable official in his position could have believed it was lawful).

In addition, defendants Brown and Bohannan-Shepard clearly did not initiate plaintiff Ogborne's prosecution. A private person initiates or procures the institution of criminal proceedings "by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused." Tomaskevitch v. Specialty Records Corp., 717 A.2d 30, 33 (Pa. Cmwlth. 1998), appeal denied, 1999 WL 462139 (Pa. July 2, 1999)(quoting Hess v. County of Lancaster, 514 A.2d 681, 683 (Pa. Cmwlth. 1986). Merely giving information or even making an accusation of criminal misconduct does not constitute a procurement of the proceedings when the charging officer exercises his discretion to initiate the proceedings unless the information is known by the giver to be false, making an intelligent exercise of the officer's discretion impossible. See Id.

There is no evidence that Mr. Brown or Ms. Bohannan-Shepard pressured the charging officers to file a complaint against Mr. Ogborne. It is uncontroverted that neither defendant nor anyone in their offices ever communicated with the police about the July 29, 1995 incident other than on that day and when they gave their individual statements. There also is no competent evidence that Mr. Brown or Ms. Bohannan-Shepard knowingly made false statements which were a determining factor

in the decision to charge Mr. Ogborne. One also cannot reasonably find from the competent evidence of record that there existed a conspiracy among defendants Brown and Bohannan-Shepard and any official to arrest plaintiff Ogborne or to initiate his prosecution.

2. § 1983 Failure to Protect Claim Based on Police Inaction at the Protest

Although far from clear and not specifically so characterized, it appears that plaintiff Ogborne may be claiming that his Fourteenth Amendments rights were violated when police officers at the scene failed promptly to extricate him when protesters blocked his truck at the exit of the Westinghouse facility on July 29, 1995.

The Fourteenth Amendment does not impose an affirmative duty on the state to protect its citizens. See DeShaney v. Winnegabo County Dep't of Social Servs., 489 U.S. 189, 195 (1989). Even where "state officials know that a person is in imminent danger of harm from a third party, the fourteenth amendment imposes upon those state officials no obligation to prevent that harm." Horton v. Flenory, 889 F.2d 454, 457 (3d Cir. 1989).

Only "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." DeShaney, 489 U.S. at 198. The state may not deliberately disregard the health and safety of someone whose freedom the state has involuntarily

restrained by incarceration or placement in a custodial environment. Id. at 200.

Under the so-called "state-created danger" theory, a plaintiff may also recover under certain circumstances when the state actively creates a danger which results in harm. To sustain a claim under this theory, a plaintiff must show that with willful disregard for his safety, state actors placed him in danger of a foreseeable injury which resulted in the deprivation of a substantive Fourteenth Amendment right. Id. at 199-201 & n.9; Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996). The state actors must have used their authority to create an opportunity which would not otherwise have existed for the harm sustained to occur. See Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995).

Liability cannot be premised on the nonfeasance or failure of state actors to protect a plaintiff from danger. See D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1375-76 (3d Cir. 1992) (en banc). See also Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990) (failure of police to protect or assist plaintiff's sister who was murdered by former boyfriend after reporting he had abducted and sexually assaulted her insufficient to trigger liability).

Cases in which cognizable state-created danger claims were found have involved substantial deprivations of liberty

interests. See e.g., Kneipp, 95 F.3d at 1203 (plaintiff sustained permanent brain damage and impairment of basic bodily functions); L.W. v. Grubbs, 974 F.2d 119, 120-21 (9th Cir. 1992) (nurse ordered by state officials to work alone with known violent sex offender was assaulted and raped), cert. denied, 508 U.S. 951 (1993); Cornelius v. Town of Highland Lake, 880 F.2d 348, 350 (11th Cir. 1989) (plaintiff kidnaped at knife point and forcibly held for three days), cert. denied, 494 U.S. 1066 (1990); Nashiyama v. Dickson County, Tenn., 814 F.2d 277, 279 (6th Cir. 1987) (plaintiffs' daughter beaten to death); Wood v. Ostrander, 879 F.2d at 586 (plaintiff was raped). Cf. Abeyta by Martinez v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253, 1257-58 (10th Cir. 1996) (unless so severe as to amount to torture, even extreme verbal abuse or harassment is not substantive due process violation); Niebus v. Liberio, 973 F.2d 526, 533 (7th Cir. 1992) ("minor assaults and batteries are not actionable as deprivations of constitutional liberty").

Plaintiff Ogborne was not in the custody of the state. He entered the Westinghouse facility and confronted the protestors of his own free will. Demonstrators and not the police prevented his egress. When the protestors would not relent, the police permitted Mr. Ogborne to leave by an access road. Mr. Ogborne was not physically injured during this episode.

One cannot reasonably find from the competent evidence of record that plaintiff suffered a substantive due process deprivation actionable under the state-created danger theory.

3. Equal Protection

Even assuming that plaintiffs meant to assert an equal protection claim, there is no evidence of record to sustain such a claim. The essence of the Equal Protection Clause is a requirement that absent a rational basis for doing otherwise, the state must treat similarly situated persons alike. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Plaintiffs have presented absolutely no evidence that any similarly situated party was treated differently by any defendant or person whose actions could be attributed to the state.

4. Property Claims

The corporate plaintiffs' property claim is predicated on a "loss of business and economic opportunity" resulting from the effective suspension of their dumping privileges at the Westinghouse site for thirteen months. Mr. Ogborne's claim is premised on the "failure to permit plaintiff to conduct business on July 29, 1995."

Plaintiffs appear to maintain that defendants violated their procedural due process rights in stating that their "property interests were nullified by defendants without

employing procedural safeguards."[17]

A violation of procedural due process occurs only when a state fails to provide an adequate means to remedy legal errors or irregularities. See Zinermon v. Burch, 494 U.S. 113, 125-26 (1990); McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994)(en banc), cert. denied, 513 U.S. 1110 (1995); Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir.) (procedural due process satisfied when state provides reasonable remedy for legal error by local administrators), cert. denied, 488 U.S. 868 (1988). The essence of procedural due process is notice and a meaningful opportunity to be heard. See Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

There is, however, no abstract federal constitutional right to process. Rather, the Fourteenth Amendment protects against a deprivation by the state of one's life, liberty or property without due process. See Olim v. Wakinekona, 461 U.S. 238, 250 (1983). See also U.S. v. Jiles, 658 F.2d 194, 200 (3d

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[17]To the extent that plaintiffs may be asserting a claim for violation of substantive due process rights in relation to the restriction on dumping at the Westinghouse facility, it suffices to note that a limitation on the dumping of waste to two of three sites and five days per week or the preclusion of dumping at one site on July 29, 1995 does not constitute deprivation of a right "'so rooted in the traditions and conscience of our people as to be ranked as fundamental' and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it was] sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 721 (1997). See also Bowers v. Hardwick, 278 U.S., 186, 191-92 (1986). Such action in the setting presented also is not so egregious or ill-conceived as to "shock the conscience." See County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999).

Cir. 1981) (no federal procedural due process right absent deprivation of life, liberty or property); Sachetti v. Blair, 536 F. Supp. 636, 641 (S.D.N.Y. 1982) (no federal due process right independent of deprivation of life, liberty or property).

Plaintiffs assume without further discussion that they had a constitutionally protected property right to dump waste and trash at the Westinghouse facility on July 29, 1995 and at any time thereafter. Protectible property interests are not created by the Constitution but are defined by independent sources such as state law. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Defeo v. Sill, 810 F. Supp. 648, 656 (E.D. Pa. 1993).

Plaintiffs have not shown or claimed that the action of the Authority foreclosed them from engaging in the waste and trash hauling business. Plaintiffs have failed to point to any law, regulation or other explicit source that bestowed upon them a property right to dump waste or trash unrestricted at a particular site or on a particular day.

The County expressly reserved the right to limit, "in its sole discretion," the times and designated facilities at which a permit holder could dump, to redirect any vehicle to an alternate designated facility, and even to decline access to all designated facilities and require a permit holder to dispose of his waste elsewhere at his expense. See Delaware County, Pa., Ordinance 90-4 § 6. See also Midnight Sessions, Ltd. v. City of

Philadelphia, 945 F.2d 667, 679 (3d Cir. 1991) (language of ordinance reserving broad discretion in granting of license precludes finding of "legitimate claim of entitlement" necessary to create property interest for purposes of due process).

Even assuming that the permit issued by the Authority created a property interest affected by the temporary restriction, plaintiffs have not shown that they were denied due process of law. To sustain a procedural due process claim, a plaintiff must show that the state does not provide a method of redress for the violations about which plaintiff complains. See Zinermon, 494 U.S. at 125-26; Bello, 840 F.2d at 1128; Rich v. Bailey, 1996 WL 745298, at *7 (E.D. Pa. Dec. 23, 1996).

Plaintiffs have not shown that the state provided no procedure to challenge the restriction on their dumping privileges imposed by the Authority. See 42 Pa. C.S.A. § 933(a)(2) (providing appeal to courts of common pleas from orders of local agencies); Elliot v. Pittsburgh, 638 A.2d 413, 415 (Pa. Cmwlth. 1994) (agency decision which leaves complainant with no other forum in which to assert claimed rights is appealable to court of common pleas). That a plaintiff fails to avail himself of a procedure to remedy a legal error does not constitute a deprivation of due process. See Midnight Sessions, 945 F.2d at 682 (plaintiffs who failed to pursue available appeal from denial of municipal license not denied due process).

Moreover, even if plaintiffs were deprived of a constitutionally protected property right without due process when the dumping privileges were suspended at the Westinghouse site, there is no competent evidence of record that any defendant was responsible for that decision. This action was taken by the Authority at the request of Westinghouse before any charge was filed against Mr. Ogborne.

B. Municipal Liability -- City of Chester

To sustain a claim for municipal liability under § 1983, a plaintiff must prove the existence of an official policy or unofficial custom that resulted in a violation of his constitutional rights. See Monell v. Department of Soc. Servs., 436 U.S. 658, 694-95 (1978). A municipality cannot be held liable under § 1983 on a respondeat superior theory. Id. at 691, 694. An action by a municipal official may constitute a "policy" if he has final discretionary authority to act with regard to the subject matter in question and deliberately chooses a particular course of action from among various alternatives. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986); Bello v. Walker, 840 F.2d 1124, 1129-30 n.4 (3d Cir. 1988).

Plaintiffs' assertion that officers of the Chester Police Department are "agents" who "operate under the supervision and control of the City of Chester" whose actions are "the actions of the City" and thus reflect its "policies and procedures" suggests respondeat superior liability.

The only specific municipal "policies" articulated by plaintiffs for which the City itself ostensibly could be liable are two actions by Chief Clark. One is the rather nebulous allegation that he "directed police to the scene who then failed to implement procedures and policy that would have permitted corporate plaintiff to conduct their [sic] lawful business." The other is Chief Clark's alleged "interference" with the investigation of the incident. Assuming that this is the type of action by a final decisionmaker which may constitute a "policy," the short answer is that one cannot reasonably find from the competent evidence of record that it resulted in a violation of any plaintiff's constitutional rights.[18]

Plaintiffs also suggest that anything done by the Mayor was per force municipal "policy." There is, however, no

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[18]Plaintiffs' contention that Chief Clark "interfered" appears to be based on his general practice of delegating charging decisions to the investigating officers. That Chief Clark was involved in the investigation does not mean he interfered with it. It is not improper or unusual for a police chief generally to delegate responsibilities to subordinate officers for the typical array of criminal investigations but also personally to become involved in cases which generate significant public attention. A police chief, for example, may properly remain uninvolved with a myriad of cases involving drug trafficking, violence and other acts of mayhem while personally overseeing or directing an investigation of the collapse of a Delaware River pier supporting a restaurant which generates particular public attention. Even violation of formal police department procedure, of course, does not give rise to a constitutional claim unless the violative conduct itself deprives the plaintiff of a constitutional right. See Green v. City of Patterson, 971 F. Supp. 891, 903 (D.N.J. 1997). One cannot reasonably find from the competent evidence of record that Chief Clark did anything which deprived any plaintiff of a constitutional right.

competent evidence that she did anything which resulted in a violation of any plaintiff's constitutional rights.

Although not addressed in any of plaintiffs' briefs, it appears from the complaint that they also claim the City failed properly to train and supervise its police officers. They allege that the City failed to "properly and adequately supervise and/or train the officers in the Police Department in investigative techniques and procedures."

A municipality may be liable under § 1983 for a failure to train subordinate officers only where such failure reflects a policy of deliberate indifference to the constitutional rights of citizens. See City of Canton v. Harris, 489 U.S. 378, 390-91 (1989); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). The same standard applies to claims of inadequate supervision. See Groman, 47 F.3d at 637.

To sustain such a claim, a plaintiff must show that a responsible municipal policymaker had actual or constructive knowledge of incidents or conduct so likely to result in future violations of constitutional rights that the failure to take adequate measures to prevent this constitutes deliberate indifference to the need to ensure the particular right in question and represents a policy for which the municipality itself is responsible. See City of Canton, 489 U.S. at 390;

Simmons v. City of Phila., 947 F.2d 1042, 1059-60 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992).[19]

The need for training or other corrective action to avoid imminent deprivations of a constitutional right must be so apparent that any reasonable policy maker or supervisor would have taken appropriate preventive measures. See Jones, 787 F.2d at 205; Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1483 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993). It is not sufficient merely to show that a particular officer acted improperly or that better training would have enabled an officer to avoid the particular conduct causing injury. See Simmons, 947 F.2d at 1060. Any failure to train or supervise adequately, of course, must also cause the violation about which the plaintiff complains. Id. at 1065.

Plaintiffs have produced no evidence to substantiate a claim for failure to train or supervise. The burden is on plaintiffs to identify "specific" training or other action which the municipality should have undertaken which would have prevented a violation of their constitutional rights. See Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir. 1997). They have not done so.

[19]There is no evidence of record of any prior incident, let alone pattern, of Chester police charging people without probable cause or otherwise violating constitutional rights.

What evidence has been presented belies plaintiffs' allegation. Inspector Butler overruled an officer who wanted to make an immediate arrest at the scene and directed that further investigation be undertaken. Numerous witnesses were interviewed and film of a portion of the incident was reviewed before any charging decision was made. Moreover, plaintiffs have failed to demonstrate any violation of their constitutional rights which could have resulted from any deficiency in training or supervision.

## V. Conclusion

The court does not condone the overbearing and inappropriate conduct attributed to some of the protestors. It also appears, however, that Mr. Ogborne did not exercise the best judgment or proceed in a prudent manner. When necessary to maintain access to roadways or businesses, courts routinely enter appropriate restraining orders. Even where persons are improperly impeding access, however, testing or "playing chicken" with them will rarely be an appropriate response.

In any event, one cannot reasonably find from the competent evidence of record that Mr. Ogborne was charged without probable cause or was unreasonably seized; that his substantive due process rights were violated during the three hours protestors blocked his truck at the maintenance of the Westinghouse facility; that any plaintiff was denied equal

protection of the laws or deprived of property without due process; that the City was deliberately indifferent to the constitutional rights of citizens; or, that any plaintiff was deprived of a constitutional right as a result of any policy, custom or conduct attributable to the City.

Defendants are entitled to summary judgment. An appropriate order will be entered.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **STEVEN OGBORNE, OGBORNE WASTE REMOVAL, INC. and OGBORNE TRASH REMOVAL, INC.** | : | |
| | : | **CIVIL ACTION** |
| **v.** | : | |
| | : | **NO. 97-4374** |
| **COUNCILMAN WILLIAM R. BROWN III BARBARA BOHANNAN-SHEPARD, THADDEUS KIRKLAND, CITY OF CHESTER, CITY OF CHESTER POLICE DEP'T., JAMES CLARK and WENDELL BUTLER** | : | |

**O R D E R**

AND NOW, this day of June, 2000, upon consideration of defendants' Motions for Summary Judgment (Docs. #94 & #101) and plaintiffs' responses, and consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that all claims against defendant city of Chester Police Department are **DISMISSED**, the Motions for Summary Judgment are **GRANTED** and **JUDGMENT is ENTERED** in the above action for all other defendants and against plaintiffs.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**